A

NAM LEONG DEPARTMENT STORE (MIRI) SDN BHD

v.

PP

B

HIGH COURT SABAH & SARAWAK, MIRI
STEPHEN CHUNG JC
[CRIMINAL APPEAL NO: MR-41-19-11-2011]
16 MARCH 2012

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FOOD AND DRUGS: *Sale - Food - Samples of salt taken from appellant's store for analysis - Chemist's analysis showed salt contained 13.7mg/kg iodine - Whether proportion complied with reg. 285(3) of the Food Regulations 1985 - Whether chemist appointed by Minister as*
D *analyst - Whether salt falls within definition of 'food' - Whether used for human consumption - Whether reasonable steps taken to ensure compliance with law - Whether sentence imposed appropriate - Food Act 1983, ss. 2, 3(1), 13B & 23*

E ***FOOD AND DRUGS:*** *Food - Definition - Whether salt falls within definition of 'food' - Whether used for human consumption - Food Act 1983, s. 2*

This was the appellant's appeal against the decision of the Magistrate's Court in convicting it under s. 13B(1) of the Food
F Act 1983 ('the Act') read together with s. 13B(2)(e) of the same Act and reg. 285(3) of the Food Regulations 1985 ('the 1985 Regulations') and imposing a fine of RM17,000 in default three months' imprisonment. PW2 and PW3, both of whom were officers working with the Pejabat Kesihatan, Miri, had taken food
G samples from the appellant's departmental store for analysis under the Act. After having informed the purpose of their visit to the appellant's supervisor, PW2 went to the food rack and chose two types of salt, *ie*, fine salt and iodine salt. PW2 then paid for the said packets and thereafter, the salt samples were sent to the
H chemistry department for analysis which was carried out by PW1. The analysis showed that the salt samples from the packet labelled 'Nam Leong' contained 13.7mg/kg of iodine, the amount of which was lesser than that fixed by law. In this appeal, the appellant submitted, *inter alia*, that the learned Magistrate erred in not

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finding that, (i) the prosecution failed to establish that the seized packets of salt were displayed for sale; (ii) the appellant did not voluntarily sell the salts for the purpose of human consumption; and (iii) the prosecution failed to establish that PW1 was an expert in the analysis of salt for the detection of iodine therein. Further, relying on s. 23 of the Act, the appellant submitted that intention or lack of knowledge was a defence under the said section. It was also asserted that it would be unreasonable to expect the appellant to analyse every batch of salt purchased for its iodine content taking into account the low retail price of the salt.

Held (dismissing appeal against conviction; setting aside sentence imposed and substituting it with a fine of RM10,000):

(1) Section 5(1) of the Act provides that any authorised officer on payment or tender to any person selling food or to his agent or servant, of the current market value of the food, may at any place demand and select and take or obtain samples of the food for the purpose of analysis. Further, food is widely defined in s. 2 of the Act and includes every article manufactured, sold or represented for use as food or drink for human consumption. It is common knowledge that salt is normally used for human consumption and comes within the definition of "food". (para 6)

(2) Evidence showed that both PW2 and PW3 were authorised officers appointed under s. 3(2) of the Act and also that the appellant had operated the departmental store where the salts and other goods were displayed for sale in the premises. However, there was no evidence to show that access or entry to the store was restricted. It was open to public and any customer could enter the store to view, choose and/or buy any of the goods which were displayed and for sale in the store. (para 5)

(2a) By virtue of s. 22(a) of the Act, the packets of fine salt bore the name of the appellant on the price tag and the trial court had come to a finding that the appellant was the packer of the said packets of salt. In addition, s. 25(2) of the Act states that the purchase and sample of food under the provisions of the Act for the purpose of analysis shall be

deemed to be a purchase and sale of such food for human consumption unless the seller proves that the bulk from which such sample was taken was not offered or exposed or intended for sale for human consumption. (paras 7 & 8)

(3) PW1 stated her qualifications and training as an expert or chemist and she had given evidence as an expert in a trial before where her evidence was accepted by the court. This was her second time in court giving evidence as an expert. Hence, by doing so, she had complied with the requirements stated in *Wong Chop Saow v. PP*. Further, PW1 was appointed by the Minister as an analyst under s. 3(1) of the Act and only qualified persons would be appointed as analysts under the said provision. In light of this, PW1 had produced the certificate of her appointment as an analyst and that was *prima facie* evidence of her qualification as an analyst under the Act. (paras 10 & 11)

(4) Regulation 285(3) of the 1985 Regulations provides that the Minister may by notification in the Gazette direct that in certain areas, no person shall manufacture for sale, sell, expose or offer for sale, consign or deliver salt for household use and human consumption unless there has been added to it potassium iodide or iodate, or sodium iodide or iodate in a proportion equivalent to not less than 20mg/kg and not more than 30mg/kg of iodine. On the facts, the sample taken from the appellant contained only 13.7mg/kg of iodine and thus, did not comply with the requirements of reg. 285(3) and the Gazette notification. (para 14)

(5) Section 23 of the Act provides that in a prosecution for selling any food contrary to the provisions of the Act or of any regulation, it shall be no defence that the defendant did not act wilfully unless he also proves that he took all reasonable steps to ascertain that the sale of the food would not constitute an offence. The learned Magistrate had considered the appellant's evidence, the provision of s. 23 of the Act and whether the appellant had taken all reasonable steps to ascertain that the sale of the salt would not constitute an offence against the Act and its regulations in coming to her decision. Further, the requirements of reg. 285(3) of the 1985 Regulations as it applied to Sarawak

has been published in the Gazette and the law presumes that the appellant had notice of the requirements after the publication in the Gazette. (paras 17, 18 & 20)

(6) The law imposed certain obligations or responsibilities on the appellant as a seller of goods for human consumption. Evidence showed that the appellant did not make any enquiry with the importer to find out or to ensure that the salt complied with the law, in particular reg. 285(3) of the 1985 Regulations before it repacked and offered the salt for sale in its premises. The appellant also did not make any enquiry with the Pejabat Kesihatan, Miri, to ensure that the salt complied with the law before it was repacked for sale. As such, the appellant had not shown that it had taken all reasonable steps to ascertain that the sale of the salt would not constitute an offence against the Act or any regulation made thereunder. The appellant had thus failed to raise any reasonable doubt on the prosecution's case. (paras 22, 23 & 24)

(7) An appellate court should be slow to disturb the sentence imposed by the learned Magistrate unless it was passed on wrong sentencing principles or was manifestly excessive or inadequate on the facts and circumstances of the case. The prosecution did not call any witness or tender any statistics to support its contention that most rural people have goitres for taking salt without iodine. Therefore, the Magistrate erred in having considered that submission whilst passing the sentence. Further, this was the first offence committed by the appellant in relation to the Act. Taking into account the facts and circumstances of this case, a fine of RM10,000 was a more appropriate penalty to be imposed against the appellant. (paras 26, 27, 28 & 30)

Case(s) referred to:

Khoo Hi Chang v. PP and Another Case [1994] 2 CLJ 151 SC ***(refd)***
Lim Chiang Aik v. Regina [1962] 1 LNS 86 PC ***(refd)***
PP v. Koo Cheh Yew & Anor [1980] 1 LNS 61 FC ***(refd)***
PP v. Lam San [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 SC ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
Samundee Devan Kerishnan Muthu v. PP [2009] 1 CLJ 498 CA ***(refd)***
Wong Chop Saow v. PP [1964] 1 LNS 218 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 45, 114(e)
Food Act 1983, ss. 2, 3(1), (2), 4(14), 5(1), 6(1), 7(1), 13B(1), (2)(e), (4), 20(i), 22(a), (b), 23, 25(1), (2), 29(1)
Food Regulations 1985, reg. 285(3)

For the appellants - Ranbir Singh; M/s Ranbir S Sangha & Co Advocs
For the respondent - Shahidah Muslimah Roslan; DPP

Reported by Kumitha Abd Majid

JUDGMENT

Stephen Chung JC:

[1] The appellant was charged and convicted under s. 13B(1) of the Food Act 1983 read together with s. 13B(2)(e) of the same Act and reg. 285(3) of the Food Regulations 1985 and was sentenced under s. 13B(4) of the Food Act 1983 to a fine of RM17,000 in default three months' imprisonment. This appeal is against both the conviction and sentence.

[2] The amended charge against the appellant read as follows:

> Bahawa kamu pada 22 November 2010 lebih kurang jam 9.50 pagi, di premis Nam Leong Department Store Sdn Bhd (504998-M), GE 14, Ground Floor, Wisma Pelita Tunku, Jalan Puchong di Daerah Miri dalam Negeri Sarawak telah menjual kepada Encik Roddy Geoffery, Nombor Kad Pengenalan 731292-13-5691, seorang Pegawai Berkuasa di bawah Akta Makanan 1983 yang memiliki Kad Kuasa Bernombor 2556 melalui Katerina Anchang Ak. Bundak, Nombor Kad Pengenalan 770525-13-5022 sebanyak tiga (3) bungkus garam halus seberat 1kg setiap bungkusan yang mana setelah dianalisa didapati mengandungi 13.7mg/kg iodin, kurang daripada 20mg/kg iodin kadar yang ditetapkan Peraturan 285(3), Peraturan-Peraturan Makanan 1985 dan dengan ini telah melanggar Peraturan 285(3) Peraturan-Peraturan Makanan 1985.
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> Oleh itu, kamu telah melakukan kesalahan menjual makanan yang diadukkan di bawah seksyen 13B(1) Akta Makanan 1983 dibaca bersama seksyen 13B(2)(e) Akta yang sama dan jika disabitkan kesalahan boleh dihukum di bawah seksyen 13B(4) Akta yang sama.

[3] The facts were as follows. On 22 November 2010, PW2 and PW3, both of whom were working with the Pejabat Kesihatan, Miri, went to the appellant's departmental store at Wisma Pelita Tunku to take food samples for analysis under the Food Act. On arrival, PW2 met PW6, who was a supervisor of the appellant at the premises. After PW2 informed PW6 of the purpose of the visit, he went to the food racks to choose food samples for the analysis. He chose two types of salt. He bought three 1kg packets of fine salt at RM1.20 each, with a 'Nam Leong' price tag on each of the packets. He also bought three 500gm iodine salt at 80 cents each. He took the packets of salts to the cash counter and paid for them. He was issued with a computerised printout receipt for his purchases. He also asked PW6 to issue a handwritten cash bill for the purchases. PW2 then labelled and sealed the two types of salt he had bought in transparent plastic in the presence of PW6 and issued to her a Food Sampling Notice under the Food Act. The samples were sent to the Chemistry Department at Bintulu for analysis which was carried out by PW1. Her analysis showed that the salt sample from the packet labelled 'Nam Leong' contained 13.7 mg/kg of iodine.

[4] I shall deal with grounds 2.1, 2.2, 2.5, 2.6 and 2.11 of the appeal together. The learned counsel for the appellant submitted that the learned Magistrate had erred in not finding that the prosecution had failed to establish that the three packets of salt seized were displayed for sale. He also submitted the learned Magistrate had erred in not finding that the appellant did not voluntarily sell the salts for the purposes of household use and human consumption as is required by reg. 285(3) of the Food Act. It was submitted that the appellant was compelled by PW2 to sell the salts for the purpose of the analysis. After reading the appeal record and the submissions, there is no merit on the above grounds of appeal.

[5] The evidence showed that both PW2 and PW3 were authorised officers appointed under s. 3(2) of the Act. The evidence showed that the appellant operated the departmental store at Wisma Pelita Tunku where the salts and other goods were displayed for sale in the premises. There was no evidence to show that access or entry to the store was restricted. It was open to the public and any customer could enter the store to view, choose and or buy any of the goods which were on display and for sale in the store.

[6] Section 5(1) of the Act provides that any authorised officer on payment or tender to any person selling food or to his agent or servant, of the current market value of the food, may at any place demand and select and take or obtain samples of the food for the purpose of analysis. Section 6(1) provides that where it is intended to submit any sample of any food for analysis, the authorised officer purchasing or otherwise procuring the sample shall inform the seller or his agent or servant selling the food that he intends to have the sample analysed by an analyst. Section 4(14) provides that an authorised officer may submit any food seized by him or any sample from it or any other sample taken by him to any approved laboratory for analysis or examination. Food is defined very widely in s. 2 of the Act and includes every article manufactured, sold or represented for use as food or drink for human consumption. It is common knowledge that salt is normally used for human consumption and comes within the definition of 'food'. From the above facts, PW2 had complied with the requirements of these provisions.

[7] Pursuant to s. 22(a) of the Act, any evidence that the package containing any food to which this Act applies bore the name, address or registered mark of an importer, manufacturer or packer shall be *prima facie* evidence that the food was imported, manufactured or packed, as the case may be, by each of the persons whose name, address or registered mark is borne on the package. Again from the above facts, the three packets of 1kg fine salt bore the name of the appellant on the price tag and the trial court had come to a finding that the appellant was the packer of the three packets of salt.

[8] Section 22(b) provides that any substance commonly used for human consumption which is sold or offered or exposed or kept for sale shall be presumed, until the contrary is proved, to have been sold, or as the case may be, to be intended for sale for human consumption. Section 25(1) provides that when any food is sold or exposed or offered for sale it shall, unless the contrary is proved, be deemed to be sold or exposed or offered for sale for human consumption. Section 25(2) adds that the purchase and sale of a sample of food under the provisions of the Act for the purpose of analysis shall be deemed to be a purchase

and sale of such food for human consumption unless the seller proves that the bulk from which such sample was taken was not offered or exposed or intended for sale for human consumption.

[9] The next ground of appeal is that the learned Magistrate erred in failing to find that the prosecution had failed to establish that the chemist (PW1) was an expert in the analysis of salt for the detection of iodine therein. The appellant submitted that although the prosecution had led evidence pertaining to her qualifications and experience on 'various food samples', they might or might not cover 'iodine in salt' because PW1 did not specify that she had training and experience in analysing 'iodine in salt'. The appellant referred to s. 45 of the Evidence Act 1950 and to the cases of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 and *Wong Chop Saow v. PP* [1964] 1 LNS 218 in support of the submissions.

[10] From the Appeal Record, PW1 had stated her qualifications and trainings as an expert or chemist and that she had given evidence as an expert in a trial before where her evidence was accepted by the court. This was her second time in court giving evidence as an expert. By doing so, she had complied with the requirements stated in *Wong Chop Saow v. PP (supra)*. The decision in *PP v. Lin Lian Chen* on expert evidence especially relating to drug cases should be read in the light of the decisions in *PP v. Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391, *Khoo Hi Chiang v. PP and Another Case* [1994] 2 CLJ 151 and *Samundee Devan Kerishnan Muthu v. PP* [2009] 1 CLJ 498.

[11] In this case, PW1 was appointed by the Minister as an analyst under s. 3(1) of the Act which also provides that the Minister may make regulations concerning their qualifications, conduct and duties. It is clear that only qualified persons would be appointed as analysts under s. 3(1) of the Act otherwise it would be rendered redundant and the Minister would have contravened the provision under s. 3(1). There was no evidence that that had happened in the appointment of PW1 as an analyst under the Act. The court may presume that judicial and official acts have been regularly performed: s. 114(e) Evidence Act. PW1 had produced the certificate of her appointment as an analyst and that was *prima facie* evidence of her qualification as an analyst under the Act to carry out the analysis required under the Act.

[12] PW1, after carrying out the analysis of the sample of salt taken from the premises of the appellant, had prepared and signed a certificate in the form prescribed by s. 7(1) of the Act and regulations. Section 20 of the Act provides that in any proceedings under the Act a certificate of analysis purporting to be signed by the analyst shall be accepted as *prima facie* evidence of the facts stated therein.

[13] The appellant had pursuant to s. 20(i) required PW1 to attend the trial and to be cross-examined. It was not put to PW1 that the analysis carried out by her was not accurate or wrong. It was not put to her that the findings stated in the certificate were wrong. The appellant was at liberty to send the sample to another or independent analyst for analysis but did not do so. The appellant also did not lead any evidence or tender another analysis or report to show that her analysis and or findings as stated in the certificate were not accurate or wrong.

[14] Regulation 285(3) provides that the Minister may by notification in the gazette direct that in certain areas no person shall manufacture for sale, sell, expose or offer for sale, consign or deliver salt for household use and human consumption unless there has been added to it potassium iodide or iodate, or sodium iodide or iodate in a proportion equivalent to not less than 20mg/kg and not more than 30mg/kg of iodine. Sarawak was designated as such an area in the gazette *vide* PU(B) 266. The certificate signed by PW1 stated that the sample taken from the appellant contained only 13.7mg/kg of iodine and did not comply with the requirements of reg. 285(3) and the gazette notification. The three packets of salt bought by PW2 had contravened the provisions of s. 13B(1) and (2)(e) of the Act. Therefore there is no merit on this ground of appeal. From the Appeal Record, the prosecution had made out a *prima facie* case against the appellant.

[15] In its defence, the appellant led evidence to show that it purchased the salt from Tong Seng Huat, a licensed importer which imported the salt from Thailand, and repacked the salt into smaller packets for sale to the public. It was the appellant's case that it was reasonable for the appellant to expect the importer to ensure that the levels of iodine in the salt complied with the law. It was the appellant's case that it would be unreasonable to

expect the appellant to have every batch of salt purchased to be analysed for its iodine content taking into account the low retail price of the salt.

[16] The appellant referred to s. 23 of the Act and submitted that intention or lack of knowledge is a defence under the section. It was submitted that the learned Magistrate was wrong in ruling that the offence is one of strict liability and that intention or knowledge to prove wilfulness was not pertinent in proving the charge and was not a valid defence. It was submitted that based on its evidence ie, that it relied on the importer to ensure that the salt imported complied with the Act, that there was no intention or that there was a lack of wilfulness on the part of the appellant to commit the offence. It submitted that on a balance of probabilities it had raised a reasonable doubt as to its guilt or culpability under the charge made against it and that the learned Magistrate had erred in failing to rule as such.

[17] From the appeal record, notwithstanding what she had said in her decision at the end of the appellant's defence regarding intention and the offence being one of strict liability, the learned Magistrate had in fact considered the evidence of the appellant, the provision of s. 23 of the Act and whether the appellant had taken all reasonable steps to ascertain that the sale of the salt would not constitute an offence against the Act and its regulations in coming to her decision.

[18] Section 23 provides that in a prosecution for selling any food contrary to the provisions of the Act or of any regulation, it shall be no defence that the defendant did not act wilfully unless he also proves that he took all reasonable steps to ascertain that the sale of the food would not constitute an offence against the Act or its regulations.

[19] Section 29(1) of the Act goes even further. It provides that subject to sub-ss. (2) and (3), the importation of any food which does not comply with the provisions of the Act or any regulation made thereunder is prohibited. Subsections (2) and (3) are not applicable to this case as they concern the importation of goods for relabelling or reprocessing of the prohibited goods so that they comply with the Act.

[20] It was not the appellant's case that it did not know or was ignorant of the law or the requirements of the Act and regulations made thereunder. It was also not the appellant's case that it could not possibly with reasonable diligence, if it had reasons to put itself on enquiry, know of the existence of the law or prohibition. The requirements of reg. 285(3) as it applied to Sarawak had been published in the gazette. The law presumes that the appellant had notice of the requirements after the publication in the gazette: see *PP v. Koo Cheh Yew & Anor* [1980] 1 LNS 61.

[21] It was the appellant's case that it bought the salt from the importer and it was reasonable for the appellant to expect the importer to ensure the levels of iodine in the salt were in compliance with the law. DW1 said that the appellant assumed the salt which was imported by a licensed importer had been examined by the local authorities. He said they trusted and solely relied on the importer that the salt would comply with the law. From the stand taken by the appellant in the trial and in this appeal, it was apparent that the appellant knew or was aware of the provisions of s. 23 and s. 29 of the Act and the regulations under the Act.

[22] Therefore, it was not reasonable for the appellant to have made such an assumption. The law imposed certain obligations or responsibilities on the appellant as a seller of goods for human consumption. The evidence showed that the appellant did not make any enquiry with the importer to find out or to ensure that the importation of the salt was not prohibited and or had complied with the law. The evidence showed that the appellant did not make any enquiry or asked for proof from the importer to ensure that the salt complied with the law, in particular with reg. 285(3), before it repacked and offered the salt for sale in its premises. The appellant also did not make any enquiry with the Pejabat Kesihatan, Miri to ensure that the salt complied with the law before the appellant offered the repacked salt for sale in its premises. These were simple things the appellant could have done, directly or indirectly, by inspection or enquiry or by refusing to buy from the importer unless the salt complied with the requirements of the Act: see *Lim Chin Aik v. Regina* [1962] 1 LNS 86.

[23] From the appeal record, I agree with the learned Magistrate that the appellant had not shown that it had taken all reasonable steps to ascertain that the sale of the salt would not constitute an offence against the Act or any regulation made thereunder. A

[24] From the evidence presented before the court, as per the appeal record, the appellant had failed to rebut the presumptions on the balance of probabilities: *PP v. Yuvaraj* [1968] 1 LNS 116. The appellant had also failed to raise any reasonable doubt on the prosecution's case. Therefore the appeal against conviction is dismissed. B C

[25] On the appeal against sentence, it was submitted that the fine of RM17,000 imposed on the appellant was excessive. It was submitted that the learned Magistrate had taken into consideration an irrelevant factor ie, the submissions by the prosecution that most rural people have goitres for taking salt without iodine and this showed how important iodine in salts are to public health. It was submitted that the Magistrate had erred when she implied that the salt sold by the appellant was unsafe for human consumption. It was submitted that there was no statistics tendered to support these and that the prosecution did not call any medical or expert evidence to support these contentions. D E

[26] An appellate court should be slow to disturb the sentence imposed by the learned Magistrate unless it was passed on wrong sentencing principles or was manifestly excessive or inadequate on the facts and circumstances of the case. The appellate court will not interfere just because it may pass a different sentence. The appeal record showed that in passing sentence the learned Magistrate had taken into consideration the mitigation of the appellant, the submissions of the prosecution, that the appellant was found guilty after a trial lasting several days and public interest. She said the prime consideration was public interest as the case involved food items sold for human consumptions. F G

[27] Reading her decision on the sentence, although she did not specifically referred to what were said by the prosecution, she had taken the submissions of the prosecution into consideration in passing the sentence. The prosecution had submitted that most rural people have goitres for taking salt without iodine. The prosecution did not call any witness or tender any statistics, facts H I

or evidence in support thereof. The learned Magistrate in taking that submission of the prosecution, which had not been proven, into account, had taken an irrelevant factor into consideration in passing the sentence and had erred.

[28] Although the provisions in the Act upon which the appellant was convicted are for the protection of public health, this was the first offence committed by the appellant. This was not a case where the appellant manufactured adulterated salt or imported adulterated salt or adulterated the salt for sale. The facts showed that the appellant had bought the salt from a licensed importer and repacked the salt into smaller packets for sale without taking steps to ascertain whether the salt complied with the Food Act.

[29] The penalty provided for under s. 13B(4), upon conviction, is a fine not exceeding RM20,000 or imprisonment for a term not exceeding five years or to both. On the facts and circumstances of this case, the fine of RM17,000 imposed for a first offence was excessive and ought to be set aside.

[30] A fine of RM10,000 is a more appropriate penalty on the facts and circumstances of this case and the same is imposed or substituted as the penalty against the appellant. The appeal against sentence is to that extent allowed.